80-530

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. -

RICHARD L. HUDSON,

Petitioner,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION
AND
THOMAS CONNOLLY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Submitted by:
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QUESTIONS PRESENTED

1. Did the court of appeals incorrectly hold — in conflict with the holdings of the District of Columbia, Tenth and Ninth Circuits — that statistical evidence, in and of itself, is not sufficient to establish a prima facie case of employment discrimination in an individual action?

2. Did the court of appeals erroneously rule — in conflict with the holding of the Sixth Circuit and district court opinions from other circuits — that petitioner could not maintain an independent claim for relief under 42 U.S.C. section 1981 for his employer's acts in retaliation for petitioner's complaints of racial discrimination?

3. Does a disparate impact claim under 42 U.S.C. section 1981 require proof of an employer's intent to discriminate?

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RICHARD L. HUDSON,

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INTERNATIONAL BUSINESS MACHINES CORPORATION AND THOMAS CONNOLLY,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitoner Richard L. Hudson prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit rendered on April 8, 1980, affirming the district court's dismissal after trial of Hudson's employment discrimination action.

OPINIONS BELOW

The opinion of the court of appeals is reported at 620 F.2d 351 and is attached as Appendix A. The opinion of the district court was orally rendered at the close of trial, and a transcript of the district court's holding is attached as Appendix B. The earlier opinion of the district court limiting petitioner's claims for relief is unreported and is attached as Appendix C.

JURISDICTION

The opinion of the court of appeals was rendered on April 8, 1980, and Hudson's petition for rehearing was denied on July 1, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

QUESTIONS PRESENTED

1. Did the court of appeals incorrectly hold — in conflict with the holdings of the District of Columbia, Tenth and Ninth Circuits — that statistical evidence, in and of itself, is not sufficient to establish a prima facie case of employment discrimination in an individual action?

2. Did the court of appeals erroneously rule —in conflict with the holding of the Sixth Circuit and district court opinions from other circuits —that petitioner could not maintain an independent claim for relief under 42 U.S.C. section 1981 for his employer's acts in retaliation for petitioner's complaints of racial discrimination?

3. Does a disparate impact claim under 42 U.S.C. section 1981 require proof of an employer's intent to discriminate?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Thirteenth Amendment to the United States Constitution provides, as follows:

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have power to enforce this article by appropriate legislation.

42 U.S.C. section 1981 provides, as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every other kind, and to no other.

STATEMENT OF THE CASE

Petitioner commenced this action in the United States District Court for the Southern District of New York in December 1973, pursuant to Title VII of the Civil Rights Act of 1964 and 42 U.S.C. section 1981. Petitioner claimed that his employer, respondent International Business Machines Corporation (IBM), and one of its managers, respondent Thomas Connolly, had discriminated against him on the basis of race in failing to promote him beyond an entry level professional position in IBM's work force at its New York Programming Center in New York City. Petitioner also contended that respondents had retaliated against him after he filed internal and administrative complaints against IBM of such racial discrimination.

Petitioner's Title VII claims were dismissed prior to trial and are not involved in this petition. The district court also dismissed plaintiff's retaliation claim prior to trial, holding that section 1981 applies only to discrimination based on race. Plaintiff's remaining discrimination claims under section 1981 were dismissed after trial, the trial court holding, *inter alia*, that plaintiff's statistical evidence could not, in and of itself, establish a prima facie case in an individual action under section 1981. The district court also held that proof of discriminatory intent is required to sustain a disparate impact claim under section 1981.

The district court's rulings were upheld on appeal by the United States Court of Appeals for the Second Circuit on April 8, 1980, and petitioner's petition for rehearing and rehearing in banc was denied on July 1, 1980. Petitioner's employment with IBM was involuntarily terminated after nearly 17 years on May 15, 1980.

REASONS FOR GRANTING THE WRIT

This case raises important issues as to the scope of relief and nature of proof required in an employment discrimination action. The court of appeals' resolution of these issues is in direct conflict with opinions of other circuits and applicable decisions of this Court.

The court of appeals held that statistical evidence is not, in and of itself, sufficient to establish a prima facie case of employment discrimination in an individual action. This holding is in direct conflict with the recent opinion of the District of Columbia Circuit Court of Appeals in Davis v. Califano, 613 F.2d 957, 962 (1979), and with opinions in the Tenth and Ninth Circuits. Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970); Morita v. Southern California Permanente Medical Group, 541 F. 2d 217 (9th Cir. 1976). The Eighth Circuit opinion cited by the Second Circuit in this case is in conflict with a prior Eighth Circuit holding. Compare King v. Yellow Freight Systems, Inc., 523 F. 2d 879, 882 (1975), with Naraine v. Western Electric Company, 507 F.2d 590, 594 (1974). The court of appeals' holding in this case is also in conflict with repeated expressions by this Court of the value of statistical evidence in proving discriminatory intent in employment, Hazelwood School District v. United States, 433 U.S. 299, 307-08 (1977); International Brotherhood of Teamsters v. United States, 431 U.S. 324, 340 n. 20 (1977); McDonnell Douglas Corporation v. Green, 411 U.S. 792, 805 (1973), and other contexts. Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266 (1977); Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 620 (1974); Turner v. Fouche, 396 U.S. 346 (1970).

The court of appeals also affirmed the district court's ruling that petitioner could not maintain an independent claim for retaliation under 42 U.S.C. section 1981. This holding is in conflict with the Sixth Circuit ruling in Winston v. Lear-Sigler, Inc., 558 F.2d

1266, 1268-71 (1977), specifically approving such an action and is also in conflict with this Court's analogous holding in Sullivan v. Little Hunter Park, 396 U.S. 229, 237-38 (1969), upholding a retaliation claim under 42 U.S.C. section 1982. The district courts have overwhelmingly upheld a section 1981 retaliation claim, Ragheb v. Blue Cross and Blue Shield of Michigan, 467 F.Supp. 94, 95-96 (E.D.Mich. 1979); Garcia v. Rush-Presbyterian-St. Luke's Medical Center, 80 F.R.D. 254, 265-66 (N.D.Ill. 1978); Cubas v. Rapid American Corp., 420 F.Supp. 663 (E.D.Pa. 1976), and the only opinion relied on by the courts below, Tramble v. Converters Ink Company, 343 F.Supp. 1350 (N.D.Ill. 1972), has been substantially modified, if not overruled, by the court that issued it. Garcia v. Rush-Presbyterian-St. Luke's Medical Center, supra, 80 F.R.D. at 265-66.

The courts below also rejected petitioner's contention that a disparate impact claim under 42 U.S.C. section 1981 does not require proof of an employer's intent to discriminate. This significant issue has troubled the lower courts since this Court's decision in Washington v. Davis, 426 U.S 229 (1976). Compare County of Los Angeles v. Davis, 556 F.2d 1334, 1339-40 (9th Cir. 1977), vacated as moot, 440 U.S. 625 (1979), with Williams v. DeKalb County, 582 F.2d 2 (5th Cir. 1978) (rehearing). This Court previously agreed to resolve this question in County of Los Angeles v. Davis, supra, but decided that case without need to reach the issue, prompting Justice Powell to note it is still an open and "important question." Id. at 637 (Powell, J., dissenting). The Court has recently granted certiorari in a case raising the identical question under 42 U.S.C. section 1982, Greene v. City of Memphis, 610 F.2d 395 (6th Cir. 1979), cert. grnt'd., 64 L.E.2d 787 (1980), suggesting that resolution of the section 1981 question may be especially appropriate at this time.

I. THE COURT OF APPEALS INCORRECTLY HELD, IN CONFLICT WITH THE DISTRICT OF COLUMBIA, TENTH AND NINTH CIRCUITS, THAT STATISTICAL EVIDENCE IS NOT, IN AND OF ITSELF, SUFFICENT TO ESTABLISH A PRIMA FACIE CASE OF EMPLOYMENT DISCRIMINATION IN AN INDIVIDUAL ACTION.

In support of his claim that respondents discriminated against him in 1970-71 in failing to promote him beyond his entry level professional position at the New York Programming Center, petitioner offered at trial statistical evidence concerning the racial composition of the professional work force at the Center. This statistical evidence demonstrated convincingly that petitioner's problems in obtaining advancement beyond level 52, the lowest level, were common to all black employees at the Center.

Of 299 professional employees at the Center in 1970, 18 (or approximately 6%) were black. (Pl.Ex. 26,27). Only one black (or less than 1%), however, was employed in any of the 75-80 existing professional positions above level 52. (Tr. 603-04). Of the 69 managers and officials at the Center, only one (or less than 1%) was black. (Pl.Ex. 26,27). No black was employed in a second, third or fourth line managerial position (Tr. 872-74).

The district court ruled, and the panel agreed, that it could not consider plaintiff's statistical evidence unless plaintiff first demonstrated respondents' purposeful discrimination against him through other proof. Both courts held that in an individual employment discrimination action, statistical evidence may be used to bolster but not establish a prima facie case. (App. A,A-5).

The panel's holding is in direct conflict with a recent decision of the District of Columbia Circuit Court of Appeals on the same issue. Davis v. Califano,

613 F.2d 957, 962 (D.C.Cir. 1979). The District of Columbia court rejected the contention that different standards should apply to individual as opposed to class actions, noting that the same rationale for drawing an inference of discrimination from statistical evidence exists in both types of action. As the court stated:

> Statistical evidence is merely a form of circumstantial evidence from which an inference of discrimination may be drawn. The invocation of statistical data works no magical incantation. As with any circumstantial evidence, the usefulness of statistical evidence "depends on all of the surrounding facts and circumstances." Teamsters, supra, 431 U.S. at 340, 97 S.Ct at 1857. Statistical proof may alone be used, without presentation of specific instances of discrimation, to establish a prima facie case of employment discrimination.
>
> . . . .
>
> We have previously indicated, and now explicitly hold, that statistical evidence may establish a prima facie case. The trial court's conclusion that such evidence has less probative value in an individual action than in a class action is in error.

Ibid. At least two other circuits have similarly held that statistical evidence may, in and of itself, establish a prima facie case of discriminatory intent in an individual employment discrimination action. Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 247 (10th Cir. 1970) (cited approvingly in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805 (1973) and International Brotherhood of Teamsters v. United States, 431 U.S. 324, 340 n. 20 (1977)); Morita v. Southern California Permanent Medical Group, 541 F.2d 217, 219-20 (9th Cir. 1976). Compare King v. Yellow Freight System, Inc., 523 F.2d 879, 882 (8th Cir. 1975), relied upon by the panel, with Naraine v. Western Electric Co., 507 F.2d 590, 594 (8th Cir. 1974).

This Court has repeatedly affirmed that statistical evidence may alone support a finding of intentional discrimination, in employment, Hazlewood School District v. United States, 433 U.S. 299, 307-08 (1977); International Brotherhood of Teamsters v. United States, supra, 431 U.S. at 339-40; McDonnell Douglas Corp. v. Green, supra, 411 U.S. at 805, as well as other contexts. Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 352, 266 (1977); Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 620 (1974); Turner v. Fouche, 396 U.S. 346 (1970). In Teamsters, the Court noted that statistical proof can by itself establish a prima facie case of racial discrimination in jury selection cases — see, e.g., Turner v. Fouche, 396 U.S. 346 (1970) — and specifically held that "statistics are equally competent in proving employment discrimination." Teamsters, supra, 431 U.S. at 339. As the Court noted, statistical evidence of racial or ethnic "imbalance is often a telltale sign of purposeful discrimination" in employment discrimination cases. Id. at 339 n. 20.

The panel's opinion affects the nature of proof in any case — employment or otherwise — where discriminatory intent is at issue. The panel's holding is in conflict with controlling Supreme Court precedents and the rulings of other circuits and should be reviewed by this Court.

II. THE COURT OF APPEALS INCORRECTLY HELD, IN CONFLICT WITH THE SIXTH CIRCUIT AND DISTRICT COURTS IN OTHER CIRCUITS, THAT PETITIONER COULD NOT MAINTAIN AN INDEPENDENT ACTION FOR RETALIATION UNDER 42 U.S.C. SECTION 1981.

In his complaint, petitioner alleged that subsequent to his internal complaints to IBM management of racial discrimination and formal complaint to the

New York State Division of Human Rights, IBM "embarked on a course designed to phase out plaintiff's responsibilities and ultimately force plaintiff to resign." (Complaint, paragraph 10, at R.7) Plaintiff contended in the district court that he was entitled to maintain a separate claim for relief under 42 U.S.C. section 1981 based on such retaliation, independent of his claim for racial discrimination.

Prior to trial, defendants moved to bar plaintiff from offering evidence of such retaliation on the ground that a claim for retaliation cannot be maintained under 42 U.S.C. section 1981. The district court agreed that section 1981 applies only to discrimination based upon race and ruled that "plaintiff cannot make out a separate claim of retaliation." (App.C.,A-17). The court of appeals affirmed that ruling on appeal.

The holding below is in direct conflict with the Sixth Circuit opinion in Winston v. Lear-Sigler, Inc., 558 F.2d 1266 (6th Cir. 1977). In Winston, the Sixth Circuit specifically held that an individual subjected to acts of retaliation as a result of his attempts to vindicate the rights of minorities may maintain a cause of aciton under 42 U.S.C. section 1981. Id. at 1268-71. The facts of Winston reveal a fact situation closely analogous to the facts of this case. In Winston, a white plaintiff alleged that he had been terminated by his employer after protesting the alleged discriminatory firing of a black co-worker. The district court dismissed the plaintiff's complaint, holding the plaintiff had not suffered racial discrimination cognizable under section 1981. The Sixth Circuit reversed, ruling that plaintiff's allegations of reprisal for his protests of discrimination against another stated a claim for relief under the statute. Accord: Ragheb v. Blue Cross and Blue Shield of Michigan, 467 F.Supp. 94, 95-96 (E.D.Mich. 1979); Garcia v. Rush-Presbyterian-St. Luke's Medical Center, 80 F.R.D. 254, 265-6 (N.D.Ill. 1978); Cubas v. Rapid American Corp., Inc., 420 F.Supp. 663 (E.D.Pa. 1976);

cf., DeMatteis v. Eastman Kodak Company, 511 F.2d 305, modified, 520 F.2d 409 (2d Cir. 1975).

In Winston, the court relied heavily on this Court's holding in Sullivan v. Little Hunting Park, 396 U.S. 229, 237-8 (1969), which granted a white plaintiff standing under 42 U.S.C. section 1982 to sue a neighborhood community corporation after he was expelled from the corporation for protesting the corporation's refusal to admit a black to whom he had leased his house. Even though the plaintiff in Sullivan had not himself been subjected to racial discrimination, the Court held that section 1982 protected him from being "punished for attempting to vindicate the rights of minorities" under that statute. As the Winston court noted, the rationale in Sullivan as to the scope of section 1982 applies with equal force to section 1981, since the statutes were enacted at the same time as part of the Civil Rights Act of 1866 to serve a common purpose of eradicating the badges and incidents of slavery. Winston v. Lear-Sigler, Inc., supra, 558 F.2d at 1271.

The sole opinion cited by the courts below in support of dismissing petitioner's retaliation action was Tramble v. Converters Ink Company, 343 F.Supp. 1350, 1354 (N.D.Ill. 1972). The applicable part of that opinion has, however, been rejected in light of Winston in the court where it was issued. See Garcia v. Rush-Presbyterian-St. Luke's Medical Center, 80 F.R.D. 254, 265-6 (N.D.Ill. 1978).

The court of appeals held that whether or not Tramble is still good law, petitioner "failed to establish any acts of retaliation" sufficient to uphold his appeal. (App A, A-6). It is difficult to understand, however, how the panel could justifiably look to the evidence presented at trial to assess a cause of action dismissed prior to trial. While it is true that petitioner was

permitted by the trial court to present evidence of retaliation, such evidence was allowed and considered by the trial court only to the limited extend it established respondents' racial discrimination (Tr. 46; App. C, A-17). It is unfair to uphold the pre-trial dismissal of petitioner's retaliation action on the basis of evidence presented at trial.

Equally important, it is simply untrue that the evidence at trial failed to establish any acts of retaliation. The panel's conclusion in this regard mirrored representations by repondents in their appellate brief and at oral argument — not any findings by the trial court, which did not consider a separate retaliation claim. In fact, the record at trial includes the following evidence of respondents' acts of retaliation against petitioner for having filed an administrative complaint:

1. Upon learning of petitioner's administrative complaint, respondent Connolly became visibly angry and said to petitioner, "What makes you think something won't happen to you because you went to the state?" (Tr. 582). Petitioner produced at trial a memo he had written to Connolly and Connolly's superior in response to Connolly's threats (Tr. 583-84; Pl.Ex. 7).

2. Shortly after Connolly's threat, petitioner was deprived of job responsibilities he had previously been assigned (Tr. 585-86, 346-47, 368) and was left with insufficient work to occupy his time (Tr. 594, 598, 898). Petitioner, a professional level employee, was assigned to menial clerical tasks in the office library (Tr. 598-99). Despite petitioner's complaints that he literally had nothing to do, no corrective action was taken, until a new manager at the Center confirmed petitioner's complaint and recommended he transfer to another facility (Tr. 600-601, 898). In this

time period, a new employee was hired into petitioner's department and assigned petitioner's previous tasks (Tr. 346, 585), although Connolly admitted at trial there was no opening for new employees in the department (Tr. 136-38). During this period of time, petitioner also received a lowered job evaluation rating, based in part on his purported failure to perform tasks he was not even assigned. (Pl.Ex. 1; Tr. 566-67, 560-61).

3. When petitioner sought to transfer to a new facility in February 1972, the manager at the new facility received a telephone call from one of IBM's equal opportunity administrators and told that because of petitioner's pending complaint with the Human Rights Commission "whatever you do, don't offer him a job — Richard Hudson a job" (Tr. 453).

4. In the summer of 1973, when petitioner sought transfer to various positions in the company, he was told by the division head of equal opportunity that no IBM location would accept him for any position because he had filed an administrative complaint of racial discrimination (Tr. 622).

Contrary to respondents' representations below, there was plainly factual evidence at trial to support petitioner's retaliation cause of action. Indeed, it is difficult to imagine a more compelling case of retaliation than a company's equal opportunity administrator telling a manager not to offer an employee a job because of the employee's administrative complaint (Tr. 453), or the division head of equal opportunity informing the employee that no company location would accept him because of his administrative complaint (Tr. 622). The rulings below denied petitioner the right to pursue this cause of action.

The court of appeals' opinion upholds an interpretation of section 1981 in conflict with the Sixth Circuit's opinion in Winston and this Court's decision in Sullivan. The panel's ruling should be reviewed by this Court.

III. THE COURT SHOULD RESOLVE THE QUESTION LEFT OPEN IN COUNTY OF LOS ANGELES V. DAVIS, 440 US.S 625 (1979), AS TO WHETHER A DISPARATE IMPACT CLAIM UNDER 42 U.S.C. SECTION 1981 REQUIRES PROOF OF AN EMPLOYER'S INTENT TO DISCRIMINATE.

The final issue presented for review in this petition is whether proof of discriminatory intent is required to sustain a disparate impact claim under 42 U.S.C. section 1981. This issue was before the Court in County of Los Angeles v. Davis, 440 U.S. 625 (1979), but not reached in the Court's resolution of that case as moot. The Court has recently granted certiorari in a case raising the same question under 42 U.S.C. section 1982, Greene v. City of Memphis, 610 F.2d 395 (6th Cir. 1979), cert. grnt'd., 64 L.E.2d 787 (1980), and in light of the similar legislative purpose and history of section 1981 and section 1982, Winston v. Lear-Sigler, Inc., 558 F.2d 1266, 1271 (6th Cir. 1977), review of the requirements of proof under section 1981 is especially appropriate at this time.

The issue was presented below in the context of petitioner's challenge to IBM's employee appraisal system. Petitioner contended that the rating system, while facially neutral, in practice operated to discriminate against IBM's black employees.

In support of this claim, petitioner presented evidence at trial of company-wide studies conducted by IBM itself to determine the effects by race of the

appraisal system. The studies demonstrated that in 1971, 55.9% of all white IBM employees receiving performance appraisals received one of the two highest appraisal ratings, while only 36.6% of all black employees received one of the first two ratings. (Pl.Ex. 28). A similar study conducted for the year 1973 revealed that 59.2% of all white employees received one of the two highest ratings, as opposed to only 39% of all black employees. (Ibid.) Further evidence at trial showed that the potential for intentional and unintentional racial discrimination in the system was especially great since the overwhelmingly white managerial work force (99% at petitioner's facility) was given no written definition of the various appraisal ratings and was thus left to apply unmeasured subjective judgments. (Tr. 378-80). See Rowe v. General Motors Corp., 457 F.2d 348, 358-59 (5th Cir. 1972).

Salary increases and promotion for IBM employees are directly affected by the appraisal rating the employee receives. Employees receiving one of the two highest ratings are deemed "promotable," and will receive a larger percentage increase than a similarly-situated employee with a lower rating. (Tr. 459-61, 828-29).

Petitioner contended at trial that this evidence of the appraisal system's disparate impact, without proof of the employer's intent to discriminate, was sufficient to establish a prima facie case, shifting the burden to the defendant to justify the business necessity or job relatedness of the appraisal system. Griggs v. Duke Power Company, 401 U.S. 424, 430-32 (1971). The district court rejected petitioner's claim, holding that petitioner's proof of disparate impact was insufficient to establish a prima facie case of intentional discrimination under Washington v. Davis 426 U.S. 229 (1976). (App. B, A-12-13). In ruling on petitioner's appeal, the panel failed to rule on this issue, thus leaving the district court holding intact.

The ruling below was premised on this Court's holding in Washington v. Davis, 426 U.S. 229 (1976). In

Davis, the Court held that a constitutional claim of employment discrimination brought pursuant to the due process clause of the Fifth Amendment requires proof of discriminatory intent. Id. at 248.

Although lower courts have, since Davis was announced, applied its constitutional holding under the Fifth Amendment to claims brought pursuant to 42 U.S.C. section 1981, see e.g., Williams v. DeKalb County, 582 F.2d 2 (5th. Cir. 1978) (rehearing), this extension of the holding is, without more, unwarranted. Although the plaintiffs in Davis had proceeded under 42 U.S.C. section 1981 as well as the Constitution, at no point in its discussion of the "constitutional" standard, did the Court make reference to section 1981 or indicate that its holding was applicable to that statute. Indeed, while the Court, at one point, indicated its disagreement with lower court cases in which section 1981 was involved, id. at 244, the Court was careful to note its disagreement only "to the extent that those cases rested on or expressed the views that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation." Id. at 245 (emphasis added).

Moreover, while section 1981 was, of course, enacted to implement constitutional safeguards, its enactment was not premised on Congress' powers under the due process or equal protection clauses of the Fifth and Fourteenth Amendments (at issue in Davis), but rather on Congress' broad powers under section 2 of the Thirteenth Amendment to eliminate slavery and involuntary servitude "by appropriate legislation," Jones v. Alfred H. Mayer Co., 392 U.S. 409, 437-440 (1968), a clause that "clothed Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States." Id. at 439; Civil Rights Cases, 109 U.S. 3, 20 (1883) (emphasis in original).

Indeed, there would seem little basis for holding the Davis "constitutional" rule applicable to section 1981 and not to Title VII, since Title VII is also designed to enforce constitutional guarantees against discrimination. Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1973). If anything, since the Civil Rights Act of 1964, of which Title VII is a part, was enacted pursuant to Congress' powers under section 5 of the Fourteenth Amendment, see Fitzpatrick v. Bitzer, 427 U.S. 445, 447-8 (1976), the Court's discussion of the constitutional standard applicable in equal protection cases is more applicable to Title VII than to section 1981.

In the instant case, the district court applied Washington v. Davis, supra, and held that petitioner's proof of disparate impact was insufficient to establish a prima facie violation of section 1981. The propriety of that holding involves what Justice Powell has called an "important question," County of Los Angeles v. Davis, supra, 440 U.S. at 637 (Powell, J., dissenting). The ruling below should be reviewed by this Court.

CONCLUSION

For the foregoing reasons, petitioner prays that his Petition for Writ of Certiorari be granted.

THE PETITIONER,
RICHARD L. HUDSON

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CERIFICATE OF SERVICE

This is to cetify that three copies of the foregoing Petition for Writ of Certiorari were mailed, postage pre-paid, to Eugene P. Souther and Kenneth J. Kelly, Esg., Seward and Kissel, Wall Street Plaza, New York, N.Y. 10005, and to Richard J. Sweetnam, Esg., International Business Machines Corporation, Armonk, New York, this 29th day of September, 1980.

/s/ DAVID S. GOLUB
DAVID S. GOLUB

APPENDICES

APPENDIX A:

OPINION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 305—September Term 1979

(Argued January 24, 1980 Decided April 8, 1980.)

Docket No. 79-7371

RICHARD L. HUDSON,

Plaintiff-Appellant,

—against—

INTERNATIONAL BUSINESS MACHINES CORPORATION and THOMAS CONNOLLY,

Defendants-Appellees.

Before:

MULLIGAN, VAN GRAAFEILAND and KEARSE,
Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Hon. Robert L. Carter, Judge, dismissing plaintiff's complaint for failure to establish that he had been discriminated against because of race in an action brought pursuant to 42 U.S.C. §1981.

Affirmed.

DAVID S. GOLUB, Stamford, Connecticut (Silver, Golub & Sandak, P.C., Stamford, Connecticut, Jay H. Sandak and Richard A. Silver, of counsel) *for Plaintiff-Appellant.*

EUGENE P. SOUTHER, New York, (Seward & Kissel, New York, New York, Kenneth J. Kelly, of counsel), *for Defendants-Appellees.*

MULLIGAN, *Circuit Judge*:

This is an appeal from a judgment by the United States District Court for the Southern District of New York dismissing plaintiff's complaint after a five day non-jury trial before the Honorable Robert L. Carter. The plaintiff Richard Hudson is black and has been employed by International Business Machines Corporation ("IBM") since August 1963. He commenced this suit on December 5, 1973, pursuant to Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.) and 42 U.S.C. § 1981.[1] Hudson claims that during the relevant period, December 5, 1970 to December 5, 1973,[2] his employer and one of its white managers,

1 In a pre-trial ruling, the Honorable Harold R. Tyler dismissed Hudson's Title VII cause of action on the ground that the action was not commenced within the statutory period of ninety days following receipt of notice of right to sue from the Equal Employment Opportunity Commission (42 U.S.C. § 2000e-5(f)(1)). *Hudson v. IBM*, 73 Civ. 5151 (S.D.N.Y. April 17, 1974).

2 Judge Tyler ruled prior to trial that Hudson was barred from asserting claims of discrimination arising prior to December 5, 1970 under the applicable three-year period of limitation (N.Y.C.P.L.R. § 214(2) (McKinney Supp. 1979)). *Hudson v. IBM*, 9 EPD ¶ 9991 [CCH] (S.D.N.Y. 1975).

defendant Thomas Connolly, discriminated against him on the basis of race through their promotional policies. He alleges that there are no similarly situated white employees in his division who have not progressed beyond his level at IBM. Further, Hudson claims that IBM retaliated against him because he filed complaints in accordance with IBM's "open door" employee grievance procedure on four occasions, and because he lodged a formal complaint with the New York State Human Rights Division alleging discrimination by IBM. In a pre-trial ruling, then Judge Harold R. Tyler ruled that Hudson could not maintain a separate claim for retaliation under section 1981 since that statute applies only to discrimination based on race. *Hudson v. IBM*, 9 EPD ¶ 9991 [CCH] (S.D.N.Y. 1975). After the trial, Judge Carter concluded below in an oral opinion that Hudson had failed to carry his burden of establishing that he had been discriminated against because of his race either by Connolly or by IBM. This appeal followed.

Appellant Hudson began his career at IBM as a calibration technician, one of the lower level non-professional positions at the company. At that time, he had only a diploma from a technical school and had completed two semesters of college. From 1963 to 1967, apellant attended college at night, largely at IBM's expense,[3] and earned a Bachelor's degree in mathematics. In November 1967, he was promoted to the position of Associate Engineer at level 52, the lowest of twelve professional levels at IBM. In 1968, however, appellant decided to abandon engineering. He became a

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3 Under IBM's tuition refund program, the company refunds to any employee 80% of the tuition he pays.

computer programming trainee, a position he retained at his professional-level title and salary despite his lack of experience in the area until May 1969. At that time, Hudson decided to once again change his career path and entered his present field of endeavor, personnel and education. As before, appellant retained a level 52 salary while learning his new job, but his title was changed to Education Specialist. Moreover, he requested and was granted a transfer to IBM's Programming Center in New York City where he had been accepted as a candidate for a Master's Degree in sociology at the New School. Appellant was ultimately awarded his doctorate in sociology in 1978, and IBM paid for his graduate studies pursuant to its tuition refund program,[1] even though sociology is a subject unrelated to Hudson's job in personnel and education.

In late 1969, after appellant had been working in his new personnel position for about six months, defendant Connolly rated appellant's job performance pursuant to IBM's appraisal and promotion practice as "exceeds requirements." At that time, the satisfactory appraisal levels were "outstanding," "exceeds requirements," and "meets requirements." When Connolly and appellant discussed the appraisal, Connolly informed Hudson that he was not then promotable beyond his entry level position in IBM's professional work force. However, Connolly suggested various classes and programs in which Hudson could participate in order to learn more about his new position at IBM and thereby improve his chances for promotion.

When appellant had not been promoted by May 1970, he began a proceeding against IBM before the

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1 See note 3, *supra*.

New York State Division of Human Rights charging that the company's appraisal program discriminated against him because of his race. Hudson's complaint was ultimately dismissed on the ground that there was no probable cause to believe that IBM had engaged in any unlawful discriminatory practice. While the proceeding was pending, appellant was denied direct access to personnel files containing salary and appraisal data concerning other employees. However, one of appellant's former managers at the Programming Center testified that appellant did not require this information in order to perform his job.

During the period applicable to this litigation, the satisfactory appraisal ratings at IBM were expanded into four categories: 1) far exceeds the requirements of the job in all areas, 2) consistently exceeds the requirements of the job, 3) exceeds the requirements of the job at times, and 4) meets the requirements of the job. During 1971, Hudson was twice awarded "3" ratings, first by Connolly and later by his white replacement, John Bergren. In later 1971, Bergren was succeeded as manager of the Programming Center by Donald McKethan, a black. When appellant raised the question of his promotability with his new manager, McKethan told him that there were no positions to which appellant could be promoted at the Programming Center, and that in fact the Center was to be phased out in 1973. McKethan suggested and instigated Hudson's transfer to the position of Associate Instructor at the Opportunities Industrialization Center ("OIC") in New York City. The OIC is a private community-action project designed to train disadvantaged minorities in the use and operation of computers. IBM participates in the program by supplying instructors and computer

equipment. When Hudson was transferred to the OIC, he was promoted to a level 53 position, and his salary was accordingly raised. In January 1973, appellant's manager at the OIC, Dr. L. Henry, gave appellant a "1" rating, the highest possible appraisal level. Moreover, in September 1973, appellant was promoted to level 55 and received another raise. At that time, he mentioned to Dr. Henry that he "would not mind" being promoted to Dr. Henry's position as manager of the OIC. However, appellant was ineligible to replace Dr. Henry under IBM's policy against promoting an employee from within a particular department to manage his former peers. Dr. Henry's position was ultimately given to Hosea Givan, a black who had not previously worked at the OIC.

On this appeal Hudson argues that Judge Carter applied erroneous legal standards as to the order and allocation of proof on his disparate treatment claims and therefore improperly concluded that he had failed to establish a prima facie case. Plaintiff argues that the standards applicable in an employment discrimination action pursuant to 42 U.S.C. § 1981 are those set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), a Title VII case.[5] In that case, the Court held that a plaintiff may establish a prima facie case of racial discrimination in the employment area by showing:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and

5 42 U.S.C. § 2000 et seq.

the employer continued to seek applicants from persons of complainant's qualifications.

At least three circuit courts have held that the *McDonnell Douglas* criteria should apply to section 1981 cases,[6] and the appellees here have in any event so conceded. We agree. Once the complainant has established a prima facie case, the burden then shifts to the respondent to show some legitimate reason for the employee's rejection. The employee must then be afforded a fair opportunity to prove that the employer's reason was pretextual. Id. at 802-04.

The record here amply supports Judge Carter's position that Hudson failed to establish a case of discrimination. Appellant's argument that he was not considered for promotion to the position of OIC manager in the fall of 1973 because of his race is particularly unpersuasive because that position was concededly filled by a black man. Similarly, Hudson's claim that IBM's failure to promote or transfer him to a position out of the OIC in the summer of 1973 was racially motivated fails because Hudson offered no proof below that any particular position in management development, personnel or equal opportunity was even available during that period. Moreover, appellant has conducted no pre-trial discovery to determine if any such position was available at the time. Appellant's argument that IBM failed to promote him beyond level 52 at the New York Programming Center in 1970-71 again founders since he failed to show that any particular higher position was available or that he

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6 *Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277 (7th Cir. 1977); *Sabol v. Snyder*, 524 F.2d 1009 (10th Cir. 1975); *Long v. Ford Motor Co.*, 496 F.2d 500 (6th Cir. 1974).

was in fact qualified for such a position. Finally, Hudson argues that he was denied proper job assignments at the New York Programming Center in 1970-71. But again he failed to establish at trial what proper job assignments were available at the Center, which at the time was scheduled to be phased out. Further, there was no showing that such assignments were ever given to whites.

Appellant's contention that under *McDonnell Douglas* Judge Carter should have permitted him to proceed to introduce evidence with respect to the four elements set forth in that case,[7] and then have required the defendants to wait until plaintiff rested to establish non-discriminatory reasons for the challenged acts, is meritless. Three of the seven principal witnesses called by counsel for Hudson during his case-in-chief had previously been designated by defendants as their own witnesses. In order to expedite matters, the defendants were permitted to present much of their case-in-chief by examining their own designated witnesses and plaintiff's other witnesses after they had been called and examined by plaintiff. Having chosen this order of proof presumably for his own strategic purposes, it is hardly appropriate for Hudson to complain here that Judge Carter somehow committed er-

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7 We note that the four *McDonnel Douglas* factors are not an inflexible formula for proving racial discrimination in the employment context. As the Supreme Court noted in *Teamsters v. United States*, 431 U.S. 324, 358 (1977):

> The importance of *McDonnell Douglas* lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act.

ror. There is no showing of any prejudice here particularly since Judge Carter offered the plaintiff the opportunity to present any rebuttal testimony at the close of the defendants' case. None was forthcoming.

We conclude that the record amply supports Judge Carter's finding that the plaintiff failed to prove that he was discriminated against as to promotions, transfers, or assignments because he was black. Nor has he shown any prejudice resulting from the order and allocation of proof here which was one he deliberately chose to adopt.

Hudson also argues that Judge Carter erroneously failed to consider statistical evidence concerning the racial composition of the work force at the New York Programming Center. The statistics purported to establish that black professional employees were discriminated against in advancing beyond level 52 positions at IBM. Judge Carter held that the statistical data alone would not establish a prima facie case. However, he held that they could be used to bolster a claim of race discrimination, and he admitted them into evidence. We find no error in this determination. In "disparate impact" cases, where plaintiff alleges that an entire class or category of minority workers are adversely affected by an employer's facially neutral policy, and in class actions alleging racially discriminatory employment practices, statistical evidence may establish a prima facie case of discriminatory effect. *Reed v. Arlington Hotel Co., Inc.*, 476 F.2d 721 (8th Cir.), cert. denied, 414 U.S. 854 (1973); *Spearlock v. United Airlines, Inc.*, 475 F.2d 216 (10th Cir. 1972); *Jones v. Lee Way Motor Freight, Inc.*, 431 F.2d 245 (10th Cir. 1970), cert. denied, 401 U.S. 954 (1971). This is not, however, a class action or disparate impact case, but

rather an individual "disparate treatment" action, where the particular employee must establish that he has been discriminated against because of his race. See *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335-36 & n.15 (1977). Hudson has failed to establish his case and the statistics standing alone do not create it. See *King v. Yellow Freight System, Inc.*, 523 F.2d 879, 882 (8th Cir. 1975).

Finally, Hudson claims that he was the victim of alleged acts of retaliation because he made a formal complaint with the New York State Human Rights Division alleging that IBM had discriminated against him. As noted above, then Judge Tyler dismissed the retaliation aspects of Hudson's complaint on the ground that section 1981 applies only to discrimination based on race, and not to retaliation for the racially neutral act of filing a complaint with an administrative agency. *Hudson v. IBM*, *supra*, 9 EPD ¶ 9991 [CCH], citing *Tramble v. Converters Ink Co.*, 343 F. Supp. 1350 (N.D. Ill. 1972). In any event, Judge Tyler did not strike the allegations of retaliation from the complaint in view of the possibility that the plaintiff might be able to prove retaliation as some evidence of his basic discrimination claim under section 1981. Whether or not *Tramble*, upon which Judge Tyler relied, is sound, the point is that Hudson failed to establish any acts of retaliation. In fact the plaintiff is still employed by IBM in a high ranking position.[8]

Accordingly, the judgment of the district court is affirmed.

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8 At the time of trial, appellant held a level 57 position and testified that his salary was "[a]round $35,000 or $36,000 a year."

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals in and for the Second Circuit, held at the United States Court House, in the City of New York, on the first day of July, one thousand nine hundred and eighty.

PRESENT:

HON. WILLIAM H. MULLIGAN,
HON. ELLSWORTH A. V. GRAAFEILAND,
HON. AMALYA L. KEARSE,

Circuit Judges.

RICHARD L. HUDSON,

Plaintiff-Appellant,

v. 79-7371

INTERNATIONAL BUSINESS MACHINES CORPORATION AND THOMAS CONNOLLY,

Defendants-Appellees.

A petition for a rehearing having been filed herein by counsel for the Appellant Richard L. Hudson

Upon consideration thereof, it is

ORDERED that said petition be and hereby is DENIED.

/s/ A. DANIEL FUSARO
A. DANIEL FUSARO, clerk

APPENDIX B: RULING OF THE DISTRICT COURT AFTER TRIAL

THE COURT: The parties have had a full opportunity, in my opinion, to present all the evidence that is relevant in this case.

I'm extremely doubtful that any of the corporate audits for the relevant period would throw any further light on the subjects, particularly in view of the fact that, as I understand it, the plaintiff is satisfied that his review of the EEOC material referred to by Mr. Huggins yesterday would not be helpful.

The parties have presented their trial memoranda and proposed findings and have argued the matter orally.

The plaintiff desires time for futher briefs, I don't believe that it would be helpful to delay a determination of this case since I'm satisfied as to what the outcome must be. Any further briefing is unlikely to change my opinion.

Plaintiff is a black employee of IBM. He has been with the company since 1963. In May, 1969, he was employed at the company's New York Programming Center. I think that is the correct name — as an Education Specialist, which is with a rating of level 52. I think that is correct.

From May 1969 to February 1971, Thomas Connolly, who is white, was the plaintiff's immediate supervisor. Plaintiff charges that between the period December 1969 to December 1973, he was victimized by racial discrimination in violation of Section 1981, and brings this action solely as an individual.

Plaintiff began his employment at IBM as a technician. At that time he had finished two semesters of college and had a diploma in electronic technology from RCA Institute.

While working at IBM and advancing upward in, I believe, engineering, he completed his college work, taking advantage of the IBM tuition refund program, pursuant to which the company refunds to an employee 80% of the tuition that he pays.

In or about 1968, he left engineering and transferred to programming. In, I believe, the early part of 1968, I think from February to June, he received training as a programmer.

In 1969, at his own request, he was transferred to the New York Programming Center and employed as indicated, as an Education Specialist.

IBM has a system of employee performance appraisal. As I understand the system, the immediate supervisor of an employee and the employee agree upon a performance plan for the year. At the end of the year the supervisor rates the employee on the level of performance that he has accomplished.

In December 1969, the satisfactory levels were outstanding, exceeds requirements, and meets requirements.

The appraisal is discussed with the employee who, again, I believe, is permitted to file a written response to his appraisal, which is filed with it, and his supervisor discusses the appraisal with the latter's supervisor.

By that, I mean, to be specific, that Mr. Connolly would discuss with Mr. Hudson his appraisal of him. Mr. Hudson would have the opportunity to write a

rebuttal or whatever comments he wanted, and in turn, Mr. Connolly would discuss Mr. Connolly's appraisal of Mr. Hudson with the person immediately above Mr. Connolly.

On December 18th, Connolly gave the plaintiff a No. 2 rating, the one exceeds requirements. He did, however, say that there was room for improvement.

Which exhibit is that? Is that 70?

MR. GOLUB: 70.

THE COURT: He wrote on the form that he felt that the plaintiff needed more exposure to making presentations to large groups, that he would like to see the plaintiff come up with some new and innovative ways, he should be approached education programs and morale concerns, that he expects to see the plaintiff involved with other educational departments and laboratories, as well as out-company educational programs, and that his assignment should get him more involved with the eductional programs for co-ops and disadvantaged minority groups.

I don't believe that this appraisal is contested, although there appears to be a contention that the requirement that the plaintiff come up with new and innovative ideas subjected him to a yardstick for promotion not required of others.

I understand the plaintiff received a salary increment in January 1970, although remaining at level 52.

It is my understanding that for the succeeding year, that is, 1971, the way the performance appraisal program works is either the employee alone,

his supervisor alone, or the employee and the supervisor together, are supposed to draft a performance program for the year.

As I understand the testimony, at that time the plaintiff requested that Connolly draft the program.

My own view -- although I can't place myself in the position of the plaintiff at that time -- but I would question, have questions in my own mind about an employee that I supervised under the circumstances who deferred to me after he had been with the program, running the program, or in the job for roughly six, seven months, about deferring to me to draft his performance program for the year; I would question whether he possessed the confidence and sufficient competitive aggression and judgmental wisdom to assume the increasingly heavy responsibilities incident to rising in the professional levels.

My own view was that that was an imprudential decision for Mr. Hudson to make and could well account for some of his other problems.

At any rate, he stayed on at the Center and as I understand it, Mr. Connolly left.

Now, before Mr. Connolly left, and in May of 1970, a complaint was filed with the New York State Division of Human Rights, and that complaint was dismissed with no probable cause.

In January of 1971, the plaintiff was appraised again and this time he received a rating -- the ratings had somewhat changed because now there were four rather than three satisfactory levels; the No. 1 was far exceeds the requirements in all key areas: No. 2 was consistently exceeds; No. 3 was exceeds the requirements at time; and No. 4 rating was met the requirement.

He was rated as having exceeded the requirements at times.

In May, as I understand it, the plaintiff received another incremental increase, although again remaining at the same level, and he filed a complaint with the EEOC.

He was appraised in November of 1971, by his then supervisor who had replaced Mr. Connolly, and he was found to have exceeded the requirements at times which, as I remember it, is the same rating that Connolly had given him.

In October of 1971, Donald McKethan became his manager. Mr. McKethan testified that the plaintiff had complained to him, as he had to the supervisor of the Center, Mrs. Bond, sometime before, that he was not being utilized and that he did not have enough work to do.

Mr. McKethan investigated that and determined that management, because of the pending matter before the State Human Rights Commission, had determined that Mr. Hudson could not have available to him the personnel files which contained, what Mr. Kethan's testimony seems to indicate, sensitive salary data and level assignment data.

There is also some testimony subsequently that it was felt that he should not receive the data in respect of the company's compliance or non-compliance with equal opportunity; or, in other words, that he should not be placed in a position of monitoring equal opportunity programming.

Through Mr. McKethan's recommendation, he was transferred out of the center to the Opportunities Industrialization Center. There he worked

under Mr. Henry for a while as associate instructor. His position was raised to level 53, and he received a salary increment.

During that period of time he received his Master's degree from the New School, I believe, and subsequent to that I think he's received his Doctorate degree, all I believe pursuant to the IBM tuition-refund program — well, not pursuant but with its help.

When Mr. Henry left, the plaintiff was not either recommended, I gather, by Mr. Henry or anyone else, to take over the management of the OIC program; someone else was brought in who happened to be black.

The plaintiff's current level is, I think, 57 at IBM. I think that his salary is somewhat in excess of $30,000 per annum.

During the course of his employment with IBM at the more technical level, he invented and received two patents for a machine known as the automatic impurity profiler.

The plaintiff has taken pains to indicate that he does not accuse Connolly of any personal bias or discrimination. He says that Mr. Connolly, as I understand him, is merely a tool of the system. I, frankly, don't know what that means in respect of the law. I don't find any evidence of any employee criteria that has been shown on the basis of this record which would lead me to find that the system at IBM is stacked against black employees.

There is data which shows that, in 1971 and 1973, roughly 55 percent or 59 percent of the white employees received ratings 1 and 2, while roughly 39 percent of the black employees received that rating; but that data, standing alone, is not usable for any

purpose without some more discrete inquiry as to the level of the employees and who they are and what.

I don't believe that the plaintiff has established — at least has not established to my satisfaction — that he was discriminated against because of his race, either by Connolly or by IBM. I don't believe that a showing has been made in respect of that. I make that decision on the basis of the need to show intentional discrimination, which is the standard I understand to be applicable, since this must be based on a constitutional dimension, in Washington v. Davis.

But I must say that even if the standard were not intentional, I don't think that the plaintiff has established it.

I must hasten to say that I am not holding that no discrimination is practiced at IBM. I do not want my decision to be understood as holding that. The plaintiff has the burden of establishing that discrimination has been practiced. If he fails to do that, that means that his allegations stand unproved.

I don't believe, either, that the appraisal system is one which gives unfettered discretion to managerial and upper-level employees. And so, Rowe is not applicable. in this instance, as I said before in trying to set out what I understood the program to be, the performance is discussed and agreed upon; the employee is given some idea, although Mr. Hudson has indicated that he wasn't given sufficient idea — but he's given some idea of what is expected of him in regard to performance and what the manager will rate him on. An employee, after he is graded, is allowed to challenge whatever grading he receives. All that goes to the next higher level. I don't think that this falls into the category of appraisals with the employee-supervisor is

able to be totally subjective.

I must add, however, the fact that there is subjectivity at this level is not a violation of the law. It appears to me that at the professional level, particulary a competitive level, the company must have some room for personal and subjective judgement to play; they are not to be in a straight jacket where all they do is to automatically apply various rules. I think the law recognizes that.

There is an allegation that one of the weaknesses of the system is that there is no job posting, but there's been no evidence that the lack of posting jobs played any part in any discrimination that this plaintiff is complaining about.

On the issue of the decision to not allow the plaintiff, while his complaint was pending, access to personnel files containing salary data and assignment levels and the subsequent decision that he should not be allowed to do any work in the equality opportunity area, I don't believe that, under these circumstances, the company can be charged with reprisal because of the fact that the employee had brought the suit.

It appears to me that the company has a right, if it is going to be in litigation, to keep itself and the employee who is in litigation from being compromised by seeing data which it feels it should only be required to produce if necessary in a lawsuit or that it may be using in terms of preparation for a lawsuit. I think, moreover, even aside from that, the company has a right to protect itself while an employee is litigating against in from giving him or having him obtain data that it regards as being sensitive. Once a lawsuit starts, that kind of data can be secured, but it can be secured under various rules and regulations announced by the Courts. I think that covers everything that I have to say.

My holding is that the charge of discrimination against IBM and Thomas Connolly remains unproved. Therefore, a judgment dismissing the action and directing judgment for the defendants is granted.

Is there anything further?

MR. SOUTHER: Should we submit any judgment or just stand on that?

THE COURT: I think you better settle the order.

I think that's better because — and do it on notice to Mr. Golub.

MR. SOUTHER: Surely.

THE COURT: I think that's the better practice.

The likelihood is that this may be or probably will be appealed. Mr. Golub will need a judgment in order for his time to appeal to start running.

MR. SOUTHER: Yes, sir.

THE COURT: Very well.

* * * *

APPENDIX C: PRE-TRIAL RULING OF THE DISTRICT COURT

Following the last pre-trial conference in this case in consideration of the written submissions of counsel for the parties filed on February 19th, 1975, the court in this memorandum will deal with the application of the defendants for rulings that (1) the applicable three-year statute of limitations bars plaintiff from asserting any claim of discrimination in violation of 42 U.S.C. section 1981, arising prior to December 5, 1970; (2) plaintiff not be permitted to offer evidence of alleged discrimination prior to May 31, 1969, when he jointed the department headed by defendant Connolly; and (3) plaintiff not be permitted to offer evidence in support of his alleged retaliation claim.

This suit was commenced on December 5, 1973. Thereafter, early in 1974, the court in part granted a motion of the defendants to dismiss upon a finding that plaintiff's claim or claims, made pursuant to Title VII of the Civil Rights Act, were untimely filed. But this court also ruled that plaintiff could continue to assert his so-called discrimination claim that because IBM's general promotion policies necessarily invoke elements of subjective judgment, they are capable of and indeed have resulted in racial discrimination against plaintiff. Although not separately stated as a claim, paragraph 10 of the complaint seems to assert that IBM retaliated against plaintiff after he filed a complaint with the New York State Division of Human Rights in May, 1970.

In my view, defendants are correct in urging that the applicable statute of limitations bars plaintiff from asserting discrimination claims arising prior to December 5, 1970. Specifically, the provisions of New York CPLR section 214(2), providing for a three-year

period of limitation, are applicable here. See Swan v. Board of Higher Education, 319 F.2d 56, at 59-60 (2d Cir. 1963); White v. Texaco, Inc. 7 EPD 9005 (S.D.N.Y. 1973).

It is likely that plaintiff has no meritorious claims of discrimination going back prior to his joining the department of defendant Connolly on or about May 31, 1969. Such a surmise is buttressed by plaintiff's testimony in his deposition before trial. This leads, as a practical matter, to another observation and ruling which might be appropriate in this case. Since all concede that plaintiff joined Connolly's department on May 31, 1969, I rule that there will be no objection to plaintiff offering, solely by way of background and to show motive or intent, any evidence he may have of discrimination on or after that date but prior to December 5, 1970.

At least one federal court has held that where, as here, plaintiff alleges retaliation against an employee because he has filed charges with the Equal Employment Opportunity Commission such allegations do not state a claim under section 1981 in that the letter only applies to discrimination based upon race. Tramble v. Converters Inc., Co., ((4 EPD 7873)) 343 F.Supp. 1350, at 1354-5 (N.D.Ill. 1972). I find the rationale of Tramble to be persuasive and rule that plaintiff cannot make out a separate claim of retaliation. Nonetheless, at this stage prior to trial, I am reluctant to strike the allegations contained in paragraph 10 in light of the possibility, however remote, that plaintiff might be able to prove retaliation as some evidence of his basic discrimination claim under section 1981.

Ordered accordingly.

Tyler, J.

Supreme Court, U. S.
FILED
NOV 18 1980
MICHAEL RODAK, JR., CLERK

No. 80-530

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RICHARD L. HUDSON, *Petitioner,*

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION

and

THOMAS V. CONNOLLY, *Respondents.*

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION

November 7, 1980

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Counter-Statement of the Questions Presented

1. Where a plaintiff in a non-class "disparate treatment" action offered statistical evidence regarding defendant-employer's work force in order to bolster his case and those statistics were received in evidence but did not cure plaintiff's failure to show the availability of a higher position to which he could be promoted, should certiorari be granted on the question whether statistics alone can establish a *prima facie* disparate treatment case brought pursuant to 42 U.S.C. § 1981?

2. Where (a) the trial court permitted plaintiff to offer evidence of retaliation as part of his discrimination claim, (b) both courts below ruled that plaintiff failed to prove any acts of retaliation, and (c) the Court of Appeals therefore did not find it necessary to pass on the question whether a retaliation claim unrelated to race can be based on the 1866 Civil Rights Act, should this Court grant certiorari to decide that question when any decision would not change the outcome of the trial?

3. Where the trial judge received plaintiff's evidence of an alleged disparate impact but rejected it as overbroad and inconclusive, and further held that under standards of both intentional and non-intentional discrimination plaintiff failed to establish his case, should this Court grant certiorari in a disparate treatment action to decide whether intent must be established in a disparate impact action brought pursuant to 42 U.S.C. § 1981, an academic question that cannot affect the decision below?

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IN THE

Supreme Court of the United States

OCTOBER TERM 1980

No. 80-530

RICHARD L. HUDSON,

Petitioner,

—against—

INTERNATIONAL BUSINESS MACHINES CORPORATION and THOMAS V. CONNOLLY,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION

Statutory Provision Involved

The following statutory provision is involved:

The Civil Rights Act of 1866, c. 31, 14 Stat. 27, codified in 42 U.S.C. § 1981 (1966 ed.):

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . .

Counter-Statement of the Case

This action was brought by petitioner* against his employer International Business Machines Corporation ("IBM") and his manager at IBM from May 1969 to February 1971. Petitioner claimed that IBM and the manager had not promoted him beyond the first professional level in 1970 because he was black. Petitioner also contended

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* Petitioner joined IBM in 1963 at a low "non-professional" position level after receiving a technical school diploma. By December 1973 when this action was commenced he had reached the fourth "professional" level. By the time of the trial, he had achieved the sixth professional level and was earning seven times his initial salary.

that respondents had retaliated against him because he had resorted to internal employee grievance procedures and had commenced unsuccessful administrative proceedings before the New York State Division of Human Rights. Petitioner alleged only these individual claims of disparate treatment and retaliation in the complaint; there were no claims as to any class of employees or allegations as to any disparate impact of any of IBM's personnel practices.

Although the complaint alleged that the claimed discrimination and retaliation violated Title VII of the Civil Rights Act of 1964 and 42 U.S.C. Section 1981, the District Court narrowed the scope of the action prior to trial. First, the court dismissed petitioner's Title VII claim since he had not commenced the action within 90 days of receiving a notice of right to sue. Petitioner continued the action on the basis of Section 1981. In a subsequent ruling, the District Court held that petitioner could not base his retaliation claim on that statute since he did not allege any racial motivation, the essential element of a Section 1981 claim. *Hudson* v. *International Business Machines Corporation*, 9 EPD ¶ 9991 [CCH] (S.D.N.Y. 1975). This ruling did not remove a single allegation from the complaint; the court gave petitioner free rein to offer whatever evidence he wished of alleged retaliation to prove racial discrimination. Judge Tyler specifically stated on that issue:

> I . . . rule that plaintiff cannot make out a separate claim of retaliation [under Section 1981]. Nonetheless, at this stage prior to trial, I am reluctant to strike the [retaliation] allegations contained in paragraph 10 [of the complaint] in light of the possibility, however remote, that plaintiff might be able to prove retaliation as some evidence of his basic discrimination claim under Section 1981. [A-17*]

As petitioner's recital of his view of the evidence demonstrates (Petition at 12-13), petitioner fully availed himself of

* Citations in the form "A-. ." refer to the pages in the Appendix to the Petition.

the opportunity Judge Tyler gave him to present evidence regarding the supposed retaliation.

During the five-day bench trial before Judge Carter, in addition to the testimony of eight witnesses and dozens of documents, petitioner offered certain statistics as evidence. He offered numbers regarding the black employees at various position levels for the single year 1970 at the facility where he was employed under respondent Connolly. ***These figures were admitted into evidence.*** Petitioner also offered in support of his new-found "discriminatory impact" theory* four numbers from an internal IBM study showing the gross percentage distribution of appraisal (or employee performance) ratings among all black and white employees of IBM nationwide. Although the figures did not differentiate between the levels of the employees listed, or whether they were professional or non-professional employees, or the length of their employment at IBM, and did not make any other relevant distinctions, ***they too were admitted into evidence.*** Judge Carter found, however, that these overbroad figures were not sufficiently meaningful to allow any inferences regarding IBM's appraisal process (A-12 - A-13).

After both sides rested, and with the evidence, arguments and witnesses' demeanor fresh in mind, Judge Carter dictated his findings and conclusions into the record. He held that petitioner failed to prove any of his contentions as to discrimination and retaliation (A-7 - A-15). Relying on this Court's 1975 decision in *Washington* v. *Davis*, 426 U.S. 229 (1975), Judge Carter rejected petitioner's argument that it was not necessary for a plaintiff in an individual, non-class disparate treatment action brought under 42 U.S.C. § 1981 to prove intentional discrimination. Nonetheless, giving petitioner all benefit of the doubt, Judge Carter further held that even if petitioner was *not* required to show intentional discrimination, his proof as to his entire case, garnered during five years of preparation, was simply insufficient.

* This claim does not appear in the complaint.

The Court of Appeals, after thoroughly reviewing the record and summarizing both the prior proceedings and the evidence, unanimously affirmed the dismissal:

> We conclude that the record amply supports Judge Carter's finding that the plaintiff failed to prove that he was discriminated against as to promotions, transfers, or assignments because he was black. . . . Hudson failed to establish any acts of retaliation. [A-5, A-6]

Reasons Why the Petition Should Be Denied

Petitioner had a full and fair opportunity to prepare his claims during more than five years of pre-trial discovery and he was given great latitude to present his case in the manner he thought best during a five-day trial. The court received the statistical and other evidence petitioner sought to introduce and which he summarizes in his petition, and then weighed that evidence under standards of both intentional and non-intentional discrimination. Both the trial and appellate courts held petitioner did not prove his case.

The purported "issues" petitioner now presents cannot alter that unanimous determination. Even if statistics could establish a *prima facie* case in an individual disparate treatment action such as this, petitioner's statistics regarding respondent's work force at one facility would not cure the gaps in his case regarding his qualifications and available positions. Even if a claim for non-racially motivated retaliation could be maintained under 42 U.S.C. § 1981, that would not change the Court of Appeals' holding on review of the entire record that "Hudson failed to establish any acts of retaliation" (A-6). And even if petitioner had asserted a true disparate impact claim and a non-intentional standard applied to such a claim under Section 1981, his evidence was found to be insufficient by the trial court. Further, the alleged conflicts among the circuits, which petitioner claims warrant this Court's review, do not exist. Even if they did, resolution of every one in his favor would not alter the outcome below. A writ of certiorari should not be granted for

the purpose of rendering nothing more than an advisory opinion that would not affect this petitioner's rights.

POINT I

Petitioner's Statistics on Racial Composition Received in Evidence Were Offered Solely to Bolster His Disparate Treatment Case, and the Court of Appeals' Ruling Regarding Those Statistics Does Not Conflict with the Authorities Cited by Petitioner.

Petitioner did not offer statistics as to the racial composition of the work force at the facility where he was located to establish any element of his *prima facie* disparate treatment claim that he was not promoted because he was black. Hence, he errs in pointing to three decisions of the Courts of Appeals for the District of Columbia, the Ninth and the Tenth Circuits in an attempt to find a conflict among the circuits he hopes will justify granting a writ of certiorari. Not one of the decisions cited conflicts with the holding in this action, for each dealt with the use of statistical proof to establish a *prima facie* case, and not, as here, merely to bolster plaintiff's claim.

This action was an individual, non-class action in which petitioner alleged a classic "disparate treatment" claim, namely, that he was not promoted to a higher level for the simple reason of his race. It was therefore incumbent on him, in accordance with decisions of this Court, to make out a *prima facie* case of discrimination specifically against him. *Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567 (1978). In *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), this Court suggested four elements which, if proven, would establish such a case:

> The complainant in a Title VII[*] trial must carry the initial burden under the statute of establishing a

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* The Court of Appeals below held the "McDonnell Douglas criteria" were applicable to actions brought under Section 1981, citing *Flowers* v. *Crouch-Walker Corp.*, 552 F.2d 1277 (7th Cir. 1977); *Sabol* v. *Snyder*, 524 F.2d 1009 (10th Cir. 1975); and *Long* v. *Ford Motor Co.*, 496 F.2d 500 (6th Cir. 1974) [A-3d].

> *prima facie* case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. 411 U.S. at 802.

In *McDonnell Douglas*, this Court further explained that after the plaintiff proved his qualifications for an open position, statistics as to the employer's "policy and practice may be helpful," 411 U.S. at 805, as part of plaintiff's *rebuttal* of the employer's defense that the employee was not qualified. In other words, this Court held in *McDonnell Douglas* that such statistics may bolster plaintiff's *prima facie* case, but not establish it. In *Furnco*, this Court pointedly illustrated the secondary role of statistics in an individual disparate treatment action by stating that statistics showing a racially *balanced* work force would not "immunize an employer from liability for specific acts of discrimination." 438 U.S. at 579 (emphasis added).

The Court of Appeals recognized that petitioner failed to establish after a full trial one of the essential elements of his case, namely, that there were positions to which he could be promoted (A-3d—A-4). The statistics regarding all of the other black employees at the facility where petitioner worked, which Judge Carter admitted into evidence, did not—and could not—fill this gap in petitioner's proof. The Court of Appeals clearly saw this fatal flaw when it held that "Hudson has failed to establish his case and the statistics standing alone *do* not create it" (A-6, emphasis added). The Second Circuit's statement (A-5) that Judge Carter did not err in holding that the statistics proffered by petitioner "would not establish a prima facie case [but] could be used to bolster" his claim, was surely a correct comment on the applicable law, but it was irrelevant to the dispositive fact that petitioner's evidence simply was inadequate.

Significantly, petitioner's attorney admitted in his summation that the work force statistics he now relies on would be insufficient alone to prove his *prima facie* case. Referring to the number of black professionals at petitioner's facility he stated:

> *We are not claiming that [these] statistics alone would be enough to sustain a finding of racial discrimination in this case.* But what we are saying is that the case law supports the proposition that statistics, in combination with other evidence, are sufficient. [Appendix on Appeal at A1295, Trial Transcript at 1092, emphasis added.]

Further confirming that the work force statistics were not offered to prove any of the elements of his *prima facie* case, petitioner now claims (Petition at 7) they showed that his alleged "problems" in obtaining advancement were supposedly "common to all black employees" at his place of employment. In other words, the numbers were admittedly offered merely to lend credence to petitioner's allegations that he had been treated differently as to his promotions because he was black or to cast doubt on IBM's defense, that is, they were intended to bolster his case. Petitioner's implicit argument before this Court that his case stood or fell on the weight given his statistics is therefore absurd. This Court should not grant certiorari to decide whether statistics alone can establish a *prima facie* case of individual disparate treatment, as petitioner urges, when those statistics were not even offered for that purpose at trial.

Petitioner tries in vain to find a conflict among the circuits by citing three of the Court of Appeals decisions that he already relied on unsuccessfully before the Second Circuit. Only a brief analysis of those decisions is necessary to demonstrate that a conflict does not exist and that the Second Circuit's decision was in all respects correct.

Davis v. *Califano*, 613 F.2d 957 (D.C. Cir. 1979), was an individual action brought pursuant to Title VII in which plaintiff claimed sex discrimination in promotions. The sole issue on appeal centered not on whether all of the evidence

elicited during both sides' direct and rebuttal cases supported the dismissal of the complaint, but whether the District Court erred on the precise point of law that statistical evidence "alone may not prove a *prima facie* case in an individual, as opposed to a class action, discrimination case." 613 F.2d at 961. The District of Columbia panel reversed on this single, narrow issue, notwithstanding the fact that a full trial had been had, and remanded for further consideration of that one issue. Unlike the ruling in *Davis* v. *Califano*, the Second Circuit's statement below as to petitioner's statistics did not result in petitioner's losing the day, but was a determination that petitioner's statistics did not fill one of the voids in his case.

Davis v. *Califano* can be further distinguished by examining the key role the statistics played in that plaintiff's *prima facie* case. In contrast to petitioner's burden of proof in this action, Ms. Davis was not required to establish her particular qualifications for the position sought or that openings existed for her since "there [were] no minimum necessary objective qualifications" for the position she thought she deserved. 613 F.2d at 964. Hence, Ms. Davis was arguing in effect that some neutrally-applied standard had a disparate impact on a group (women employees) of which she was a member. It is well-settled that statistics alone can establish a *prima facie* disparate impact or pattern-and-practice case. *See, e.g., Reed* v. *Arlington Hotel Co.*, 476 F.2d 721 (8th Cir.), *cert. denied*, 414 U.S. 854 (1973). This action was not such a case.

The decision from the Tenth Circuit which petitioner characterizes as conflicting, *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F.2d 245 (10th Cir. 1970), was an individual disparate *impact* case. There, four black plaintiffs challenged under Title VII a "no transfer" policy regarding two classes of truckdrivers. There was "no claim that the policy ha[d] been unfairly or discriminately applied," 431 F.2d at 247 (the classic disparate treatment claim); rather, plaintiffs alleged the policy was "superficially neutral" as applied. *Id.* This, plus the "business necessity" defense asserted, are the hallmarks of a disparate impact case where the role of statistics is markedly different.

The final decision petitioner cites is *Morita* v. *Southern California Permanente Medical Group*, 541 F.2d 217 (9th Cir. 1976). In affirming the dismissal of the individual plaintiff's complaint for failure to prove his qualifications for promotion, the court there simply recited, at page 219, "This Circuit has recognized that disparities in the numbers of minority . . . employees *may* establish the plaintiff's *prima facie* case," and cited its decision in *United States* v. *Ironworkers Local 86*, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971). The latter case itself was a class-type "pattern-and-practice" action against five unions by the federal government on behalf of black construction workers primarily charging that the union's admission criteria had a "differential impact". Hence, petitioner's reliance on *Morita* is misplaced.*

There is not any conflict between the Second Circuit's decision in this action and the decisions petitioner cites for the simple reason petitioner offered the statistics to bolster an otherwise unproven claim. Accordingly, the writ should not be granted.

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* None of the other decisions petitioner lists (Petition at 8-9) lends support to his arguments. In *King* v. *Yellow Freight System, Inc.*, 523 F.2d 879, 882 (8th Cir. 1975), the court affirmed dismissal of the complaint, noting that while "[s]tatistics may be used to prove a . . . class action," they are "not determinative of an employer's reason for the action taken against the individual grievant." In *Naraine* v. *Western Electric Co.*, 507 F.2d 590 (8th Cir. 1974), plaintiff failed to prove his individual case and statistics regarding the employer's policy were not considered. *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977), and *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), were government "pattern-and-practice" cases, not individual actions. *Mayor of Philadelphia* v. *Educational Equality League*, 415 U.S. 605 (1974), was an action by a nonprofit group on behalf of all citizens of Philadelphia where the issue was the proper method of using and interpreting statistics in deciding whether the racial composition of a school board mirrored the population. *Turner* v. *Fouche*, 396 U.S. 346 (1970), was a class action not even relating to employment discrimination.

POINT II

In Affirming the Trial Court's Finding That Petitioner Failed to Establish Any Acts of Alleged Retaliation, the Court of Appeals Did Not Find It Necessary to Decide Whether a Black Plaintiff Could Maintain a Retaliation Claim Unrelated to Race Discrimination under 42 U.S.C. Section 1981.

Petitioner's evidence below failed to establish any of the retaliatory acts alleged in the complaint. The Second Circuit therefore specifically declined to decide the issue petitioner now raises concerning the nature of a retaliation claim under Section 1981. It is self-evident that this Court should not grant certiorari where the appellate decision below does not contain any holding on a particular question of law, let alone one that conflicts with decisions in other circuits.

The complaint alleged petitioner was retaliated against not because he was black, but because he had commenced grievance proceedings within IBM and before a state administrative agency. Respondents moved the District Court to dismiss petitioner's retaliation claim on the ground that Section 1981 provided a court-created remedy for racially-motivated acts, but the retaliation petitioner alleged was admittedly not motivated by "racially-based animus." The District Court, relying on the reasoning of *Tramble* v. *Converters Ink Co.*, 343 F. Supp. 1350 (N.D. Ill. 1972), ruled that petitioner could not "make out a *separate* claim of retaliation" (A-17, emphasis added) under Section 1981.* It did not, however, strike a single allegation of the complaint and authorized petitioner to use any evidence of alleged retaliation to prove his "basic discrimination claim" (A-17).

* The *Tramble* decision is in accord with decisions of this Court and Courts of Appeals. *See, e.g., McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273, 295 (1976); *Runyon* v. *McCrary*, 427 U.S. 160 (1976); *Patterson* v. *American Tobacco Co.*, 535 F.2d 257 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976); *Campbell* v. *Gadsden County Dist. School Bd.*, 534 F.2d 650 (5th Cir. 1976).

Despite petitioner's urging on appeal, the Second Circuit found it unnecessary to decide whether the District Court erred in following the *Tramble* case. The Court stated:

> . . . Judge Tyler dismissed the retaliation aspects of Hudson's complaint. . . . In any event, Judge Tyler did not strike the allegations of retaliation from the complaint in view of the possibility that the plaintiff might be able to prove retaliation as some evidence of his basic discrimination claim under Section 1981. ***Whether or not Tramble, upon which Judge Tyler relied, is sound, the point is that Hudson failed to establish any acts of retaliation.*** [A-6, emphasis added.]

Plainly, a writ of certiorari is not warranted where the Court of Appeals did not address the issue presented in the petition, and more important, where the evidence shows that a resolution of a point of law in petitioner's favor would not have made any difference to the outcome of the trial. Granting the petition would be tantamount to agreeing to give "an opinion advising what the law would be upon a hypothetical state of facts." *Aetna Life Ins. Co. of Hartford, Conn.* v. *Haworth*, 300 U.S. 227, 241 (1937). *Cf. Bell* v. *Maryland*, 378 U.S. 226, 237 (1964) (This Court does not decide questions "not necessarily presented for decision. Such a course would be inconsistent with our constitutional inability to render advisory opinions.").

Petitioner insists before this Court, however, that his interpretation of the evidence he presented at trial—which was reviewed (and rejected) by the Second Circuit on appeal of this very same issue—supports his allegations as pleaded (Petition 11-13). Petitioner's version of the evidence, however, merely summarizes his own self-serving testimony and hearsay; it ignores the damaging admissions elicited from petitioner and his witnesses on cross-examination and the unrefuted facts established during respondents' defensive case. Both the trial and appellate courts had before them the *entire* record, and both courts arrived at the same conclusion, without dissent.

It is not the function of a writ of certiorari to present to this Court for *de novo* review findings of contested facts made

after trial and unanimously affirmed on appeal. *International Brotherhood of Electrical Workers* v. *Foust*, 442 U.S. 42, 46 n. 7 (1979); *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949) ("A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.")

> The policy underlying the "two-court" rule is obvious. This Court possesses no empirical expertise to set against the careful and reasonable conclusions of lower courts on purely factual issues. When, as here, resolution of the disputed factual issues turns largely on an assessment of the relative credibility of witnesses whose testimonial demeanor was observed only by the trial court, the rule has particular force. *Berenyi* v. *District Director, INS*, 385 U.S. 630, 636 (1967).

Petitioner does not offer any justification for departing from this long-standing and compelling rule.* A writ of certiorari should not be granted as to the retaliation claims, which remained merely "claims," never established.

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* Even assuming *arguendo* that the District Court's ruling on the scope of Section 1981 in this action adversely affected petitioner and that the Second Circuit impliedly affirmed that ruling, petitioner has failed to show the necessary conflict among the circuits. None of the cases he cites (Petition at 10-11) involved a claim of retaliation asserted by a black plaintiff or the precise issue whether alleged retaliation for seeking legal redress gives rise to a claim under Section 1981. Rather, they involved the issues (a) whether a non-black who has been discriminated against because he helped blacks who were themselves trying to overcome racially-motivated discrimination has the same standing to sue under Section 1981 as do the direct victims of racial hatred (*Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *Winston* v. *Lear-Siegler, Inc.*, 558 F.2d 1266 (6th Cir. 1977); *DeMatteis* v. *Eastman Kodak Co.*, 511 F.2d 306, *modified*, 520 F.2d 409 (2d Cir. 1975)); or (b) whether Section 1981 extends to non-black minorities where the discrimination is racial in character (*Ragheb* v. *Blue Cross and Blue Shield of Michigan*, 467 F. Supp. 94 (E.D. Mich. 1979) (national origin claim involving "racial situations"); *Cubas* v. *Rapid American Corp.*, 420 F. Supp. 663 (E.D. Pa. 1976) and *Garcia* v. *Rush-Presbyterian-St. Luke's Medical Center*, 80 F.R.D. 254 (N.D. Ill. 1978) (anti-Spanish animus alleged as racial in character)).

POINT III

Since the Trial Court Held Petitioner's "Disparate Impact" Evidence Insufficient and Further Held He Failed to Prove His Case under a Standard of *Non*-Intentional Conduct, the Issue of Intent to Discriminate in a Section 1981 Disparate Impact Action Is Merely Academic.

Petitioner failed at trial to present meaningful evidence of the purported "disparate impact" of an employee rating process at IBM in which each employee's performance in carrying out his assigned responsibilities is judged by his immediate manager.* Disregarding the fact that IBM's more than a quarter-million professional and non-professional level employees perform a multitude of functions and bring to their jobs different degrees of experience, petitioner merely offered four simple across-the-board and nationwide figures. These figures, not even subjected to accepted methods of statistical analysis this Court has indicated are appropriate,** were nonetheless admitted into evidence. The trial judge, however, recognized the complexity of IBM's work force and held the data insufficient to prove anything:

> [T]hat data, standing alone, is not usable for any purpose without some more discrete inquiry as to the level of the employees and who they are and what. [A-12 - A-13.]

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* IBM disputes the contention that "distribution" of appraisal ratings at IBM can be the subject of a disparate impact claim for the simple reason that appraisals are not awarded mechanically. *See International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 335 n. 15 (1977). An employee's appraisal rating is the result of the evaluation by his manager of that employee's sustained performance in a particular job. As a result, the totality of appraisals of all employees is the product of separate and independent judgments by each manager based on the varying requirements of each position and function. Thus, if race discrimination occurs with respect to any appraisal it can only be because a particular manager has rated a black employee lower than his performance warrants *because he is black*. This is the essence of a disparate *treatment* claim. Disparate treatment claims cannot logically be "aggregated" to construct a disparate impact claim.

** *See, e.g., Castaneda* v. *Partida*, 430 U.S. 482, 496 n. 17 (1977).

Judge Carter then held that none of petitioner's evidence proved his claims:

> I don't believe that the plaintiff has established . . . that he was discriminated against because of his race. . . . I make that decision on the basis of the need to show intentional discrimination, which is the standard I understand to be applicable . . . in *Washington* v. *Davis*.
>
> But I must say that *even if the standard [was] not intentional, I don't think that the plaintiff has established it.* [A-13, emphasis added.]

The foregoing record demonstrates that the third and final ground petitioner offers for the writ is an academic non-issue. Whether or not Section 1981 requires a showing of a deliberate intent to discriminate, petitioner's scanty evidence as to the supposed "impact" of IBM's appraisal process was deemed meaningless, and consequently his so-called "discriminatory impact" case failed. Thus, even if this Court decided that Section 1981 supports a claim of non-intentional discrimination, it would not affect the outcome of this litigation. Certiorari is not meant for such academic and moot questions.

> [T]he duty of this Court "is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." Mills v. Green, 159 U.S. 651, 653 [citations]. *Local No. 8-6, Oil, Chemical and Atomic Workers* v. *Missouri*, 361 U.S. 363, 367 (1960).

See also Preiser v. *Newkirk*, 422 U.S. 395 (1975).

Because petitioner's failure to present meaningful statistics rendered his impact claims moot, this action is not the appropriate vehicle for deciding the question of the standard of proof under Section 1981 for "disparate impact" claims, and the petition should be denied.

Conclusion

For the foregoing reasons, the petition should be denied.

November 7, 1980

Respectfully submitted,

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